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Supreme Court, U.S.
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No. 95-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JERRY CANNON, Individually and on behalf of the Estate of Phyllis Cannon, Deceased,

Petitioner,

v.

GROUP HEALTH SERVICE OF OKLAHOMA, INC., d/b/a BLUE CROSS & BLUE SHIELD OF OKLAHOMA, INC., GHS HEALTH MAINTENANCE ORGANIZATION, d/b/a BLUE LINCS HMO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

A. Whether the United States Court of Appeals for the Tenth Circuit correctly held that petitioner's state law claim arising out of the processing of a claim for employee benefits is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et seq.*, as amended ("ERISA").

B. Whether this Court's decision in *Varity Corporation v. Howe*, 516 U.S. ___, 134 L.Ed.2d 130, 116 S.Ct. 1065 (1996) permits petitioner to pursue a state law claim for compensatory and punitive damages arising out of respondents' processing of a claim for employee benefits.

LIST OF INTERESTED PARTIES

The petitioner is Jerry Cannon, individually and on behalf of the Estate of Phyllis Cannon, deceased.

The respondents are correctly identified in the caption. Mark E. Schmidtke of J R Ebenstein Consultants is the counsel of record for all respondents. Jaime Ruth Ebenstein of J R Ebenstein Consultants and Page Dobson and J.R. "Randy" Baker of Holloway, Dobson, Hudson, Bachman, Alden, Jennings, Robertson & Holloway are also counsel for respondents.

Each of the respondents join in this brief in opposition.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari. The decision below is consistent with, even mandated by, previous decisions of this Court regarding the scope of ERISA preemption and is also consistent with decisions by the other federal circuit courts. Furthermore, petitioner has failed to raise any valid federal constitutional law issue that would

merit the attention of this Court. In summary, there is no reason for this Court to review the decision below.[1]

JURISDICTION

This Court has discretionary jurisdiction to review cases in the federal courts of appeals after rendition of a judgment. 28 U.S.C. §1254(1). For the reasons set forth herein, this Court should not exercise this jurisdiction.

STATUTES INVOLVED

This case involves sections 502(a) and 514(a) of ERISA, 29 U.S.C. §§ 1132(a), 1144(a).[2]

STATEMENT OF THE CASE

A. Statement of Facts

For purposes of the matters at issue herein, the allegations and undisputed facts are as follows:

Hendershot Tool Company established and maintained an employee welfare benefit plan for its employees. The plan provided, among other things, medical benefits to participants and beneficiaries of the plan. Beginning in 1987, the plan was funded, at least in part, by group health contracts issued by respondents.

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[1] For the convenience of the Court, all citations to the Tenth Circuit opinion, as well as to the lower court decisions, will be to the documents included in the appendix to the petition.

[2] The text of ERISA, §502(a) is set out at App. 39-40. The text of ERISA, §514(a) is set out in the Opposition Appendix ("Opp. App.") beginning at Opp. App. 1.

Petitioner's decedent was a participant in the employee benefit plan. She opted for coverage under BlueLincs HMO. In 1992, petitioner's decedent made a claim for benefits under the plan to pay for proposed autologous bone marrow transplant treatment ("ABMT"). Although the claim was originally denied, it was ultimately approved on review.[3] Petitioner alleges that his decedent could no longer obtain the treatment after it was approved.

Although petitioner now suggests that the treatment was of an emergency nature, at no time did petitioner or his decedent ever seek injunctive relief, as is expressly permitted under ERISA, §502(a)(1)(B) (allowing an action by a participant or beneficiary "to enforce his rights under the terms of his plan or to clarify his rights to future benefits under the terms of the plan"). Moreover, although petitioner has attempted to disguise his claim in equitable terms, the only relief he has sought in this action has been compensatory and punitive damages. Petitioner's suit is based on the processing of the claim for plan benefits.

B. Decisions of the Courts Below

This action was originally filed in state court. Respondents removed the action to the United States District Court for the Western District of Oklahoma.

Petitioner's original complaint and his first attempted amended complaint were based solely on state law causes of action arising out of respondents' processing of

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[3] ERISA requires that a plan offer at least one level of review following a claim denial. ERISA, §503(2), 29 U.S.C. §1133(2).

the claim for plan benefits. Petitioner originally argued that the Hendershot Tool benefit plan was not an ERISA plan and that, in any event, the state law claims were "saved" from preemption as laws that regulate insurance.[4] On September 2, 1994, the district court granted summary judgment to the respondents, holding that Hendershot Tool had established an ERISA benefit plan and that plaintiff's state law claims were preempted by ERISA. (App. 19.)

After the district court entered summary judgment, petitioner attempted to amend his complaint to assert certain claims under ERISA and the Lanham Trademark Act, 15 U.S.C. §1051, *et seq.* On December 8, 1994, the district court denied plaintiff's request. The court held that the petitioner's claims, although phrased in equitable terms, were really claims for damages which are not recoverable under ERISA. (App. 30.) The district court also rejected petitioner's breach of fiduciary duty claims under ERISA, §502(a)(2) and §409 because petitioner was seeking personal damages[5] and because the Court construed petitioner's claim as one for benefits under the plan. (App. 31.)

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[4] ERISA excepts from preemption state laws that regulate insurance. ERISA, §514(b)(2)(A).

[5] This Court held that there is no private cause of action for damages for breach of fiduciary duty under ERISA, §502(a)(2) and §409 in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

Petitioner appealed. Petitioner no longer challenged the existence of an ERISA plan[6] and abandoned his ERISA breach of fiduciary duty claim and the claim under the Lanham Trademark Act. Instead, petitioner alleged that his state law claims were not preempted and proposed a federal common law damages remedy which he termed an "estoppel" claim. The Tenth Circuit panel unanimously affirmed the district court on February 28, 1996. The appellate panel correctly held that petitioner's state law claims arose out of the processing of a claim for ERISA benefits, that they "related to" an ERISA plan, that they were therefore preempted by ERISA, and that they were not laws that regulate insurance so as to be excepted from preemption. (App. 6-9.) Basing its decision on *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), where this Court held that ERISA's remedial provisions were intended to entirely *displace* state law remedies, the Tenth Circuit also correctly held that preemption was proper even though petitioner had no damages claim under ERISA. (App. 9-12.) The appellate court noted that to hold otherwise would create distinctions between ERISA plaintiffs that were never intended by Congress:

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[6] Given petitioner's concession that Hendershot Tool established an ERISA plan, there is no legitimate reason for petitioner to include the discussion at footnote 1 of his petition. Whether or not the benefit plan was self-funded or whether or not respondents' sales representatives mentioned ERISA are irrelevant to the preemption issues in this case. Furthermore, while it may be true that early on in this case respondents' trial counsel suggested that Hendershot Tool might have some liability, Hendershot Tool's representative testified that this was only after *petitioner's* counsel made a similar suggestion. (Deposition of Henry Johnson, p. 45.) Of course, all of this is irrelevant because petitioner has never sued Hendershot Tool nor have respondents ever raised any issue that Hendershot Tool was a necessary defendant in this action.

> Mr. Cannon has failed to explain why one class of potential plaintiffs—those without available ERISA remedies—should be entitled to state common law and statutory remedies which would remain unavailable to another class of plaintiffs—those with alternative ERISA remedies. The proper focus for preemption analysis should be on the nature of the claim for relief, not on whether a particular plaintiff has a potential remedy under ERISA.

(App. 11-12.) The Tenth Circuit also properly rejected petitioner's constitutional law claims—holding that state law rights must give way to Congress' use of its Commerce Clause powers to enact ERISA and holding that petitioner failed to proffer any relevant authority to support his claim for some constitutionally protected "right to access justice". (App. 13-15.) Finally, the appellate court held that, even if an estoppel claim were available under ERISA, petitioner failed to state such a claim because his claim "had nothing to do with any misrepresentations" and that this case "simply was a disagreement over the proper interpretation of the terms of the plan". (App. 17.) Petitioner did not seek a rehearing.

REASONS FOR DENYING THE WRIT

A. Congress Enacted ERISA To Establish Uniform Regulation Of Employee Benefit Plans By Giving Preeminence To Federal Law.

In order to establish uniformity in the regulation of employee benefit plans, Congress enacted ERISA, §514(a), 29 U.S.C. §1144(a), which broadly preempts all state laws that "relate to" employee benefit plans. Congress also gave an expansive definition to state law, including "decisions", "laws", "rules", and "regulations"

within the preemptive reach of ERISA. ERISA, §514(c)(1), 29 U.S.C. §1144(c)(1). This was a critical part of Congress' effort to ensure the total "*displacement* of State action in the field of private employee benefit programs". *See* 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits) (emphasis added).

As this Court has noted, ERISA was the product of compromise: "[ERISA is] an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs". *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). Among other things, ERISA reflects compromises that were necessary to satisfy Congress' "desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corporation v. Howe*, 516 U.S. ___, 134 L.Ed.2d 130, 139-40, 116 S.Ct. ___ (1996).

B. Consistent With The Intent Of Congress, This Court Has Continually Given A Broad Interpretation And Application To ERISA's Preemption Clause.

This Court has repeatedly acknowledged the expansive nature of preemption of state law under ERISA, the exclusivity of ERISA's civil enforcement scheme, and the focus of Congress on the uniform regulation of employee benefit plans. *See, e.g., District of Columbia v. The Greater Washington Board of Trade*, 506 U.S. 125 (1992) (state law requiring employers to provide same level of health insurance coverage for employees eligible for worker's compensation is preempted by ERISA); *Inger-*

soll-Rand Company v. McClendon, 498 U.S. 133 (1990) (state law wrongful discharge claim is preempted by ERISA); *FMC Corporation v. Holliday*, 498 U.S. 52 (1990) (state laws prohibiting subrogation by self-funded benefit plans are preempted by ERISA); *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825 (1988) (state law specifically exempting ERISA plans from garnishment procedures is preempted by ERISA); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (state law tort and contract claims are preempted by ERISA); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (state law breach of contract, bad faith, and fraud in the inducement claims are preempted by ERISA); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (state law prohibiting discrimination in employee benefit plans is preempted by ERISA).

This Court has held on several occasions that the pre-emption provision of ERISA is extremely broad. *See, e.g.*, *Pilot Life*, 481 U.S. 45-46 ("the express pre-emption provisions of ERISA are deliberately expansive"); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983) ("the breadth of [29 U.S.C. §1144(a)'s] pre-emptive reach is apparent . . . ."). Furthermore, because Congress used the phrase "relate to" in its broad sense, this Court has "emphasized that the pre-emption clause is not limited to 'state laws specifically designed to affect employee benefit plans.' " *Pilot Life*, 481 U.S. at 47-48. *Accord*, *Shaw*, 463 U.S. at 98 (preemption clause should not "be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility, and the like.").

Congress used "deliberately expansive" language in ERISA's preemption clause that was "designed to 'establish pension plan regulation as exclusively a federal concern' ". *Pilot Life*, 481 U.S. at 46 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)). Nowhere did Congress more clearly demonstrate its desire for uniform regulation of employee benefit plans than in its enactment of ERISA's detailed civil enforcement scheme codified at §502(a). This civil enforcement scheme "is one of the essential tools for accomplishing the stated purposes of ERISA". *Pilot Life*, 481 U.S. at 52. The detailed and comprehensive nature of this civil enforcement scheme evidences an intent that ERISA *displace* state law remedies *without* necessarily *replacing* those remedies:

> [T]he detailed provisions of §502(a) set forth a comprehensive civil enforcement scheme that *represents a careful balancing* of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The *policy choices reflected in the inclusion of certain remedies and the exclusion of others* under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in §502(a) of the statute as finally enacted . . . provide strong evidence that *Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly*.'

Pilot Life, 481 U.S. at 54 (emphasis added). *See also Metropolitan Life v. Taylor*, *supra*; *Ingersoll-Rand v. McClendon*, *supra*.

C. The Tenth Circuit's Decision That Petitioner's State Law Claims Are Preempted By ERISA Is Not Only Consistent With, But Mandated By, This Court's Decisions Regarding ERISA Preemption And Is Also Consistent With Similar Decisions By Other Federal Circuit Courts.

The premise of petitioner's principal argument—that ERISA has not offered him or his decedent a remedy for the dispute over plan interpretation—is wrong. By way of example, after the original claim for authorization was denied and affirmed on August 21, 1992, plaintiff certainly could have sought injunctive relief regarding the availability of plan benefits pursuant to ERISA, §502(a)(1)(B); *Pilot Life*, 481 U.S. at 53 ("Relief [under §502(a)] may take the form of . . . an injunction against a plan administrator's improper refusal to pay benefits"). Although there was a period of at least several weeks between the denial of the request for review and the decedent's alleged relapse in October, no such action was ever filed. Whatever the reason why no injunctive proceeding was ever pursued in this case, the undisputed fact is that ERISA provided such a remedy to petitioner. Petitioner's claim that he has been completely foreclosed from a remedy under ERISA is baseless.[7]

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[7] The district court noted that petitioner had potential equitable remedies available to him, but that he was not entitled to recover money damages under ERISA. (App. 31.) The appellate court noted generally that petitioner had no available remedy under ERISA, but this must be read in the context that by the time this lawsuit was filed, the petitioner no longer had an injunctive remedy available to him insofar as the recovery of plan benefits was concerned. It must also be read in the context that petitioner has sought nothing other than *damages* in this case, which damages are not recoverable under ERISA.

Petitioner's argument that ERISA forecloses any current remedy to him is also misleading. Regardless of how petitioner tries to characterize it, the *only* remedy petitioner has ever sought in this case is compensatory and punitive *damages*. It is true that petitioner has no damage remedy under state law (because plaintiff's state law claims are preempted) or under ERISA (because ERISA remedies are equitable). However, as this Court has noted, ERISA offers a "panoply of remedial devices" for alleged breaches of fiduciary duties, violations of plan terms, and/or violations of ERISA. *See Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. at 146. Petitioner made no attempt at any time to craft a cause of action for the equitable remedies that *were* available under ERISA.

There is a substantial discrepancy between what petitioner *says* in this case and what plaintiff really *means*. When petitioner *says* that he has "no" remedy under ERISA, what petitioner really *means* is that he cannot recover the types of *damages* under ERISA that might be available under state law. It is the absence of a claim for compensatory and punitive *damages* that is at the root of the petition in this case. However, this Court has made it abundantly clear that the absence of certain remedies from ERISA is not an "inadvertent omission" and certainly not a "gap" to be filled by state law. *Pilot Life*, *supra* (state law bad faith damages claims are preempted by ERISA even though ERISA does not provide any replacement "bad faith" causes of action). Following this Court's lead, the federal circuit courts have uniformly held that the absence of a replacement remedy in ERISA for preempted state law claims does *not* vitiate preemption. *See, e.g., Rice v. Panchal*, 65 F.3d 637, 641

(7th Cir. 1995) (citing *Pilot Life* and *Ingersoll-Rand* for the proposition that "[ERISA] *displaces*, but not necessarily replaces, state law") (emphasis in original); *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 943 (6th Cir. 1995) ("One consequence of ERISA preemption, therefore, is that plan beneficiaries or participants bringing certain types of state actions—such as wrongful death—may be left without a meaningful remedy"); *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1537-38 (10th Cir.), *cert. denied*, 114 S.Ct. 81 (1993) ("the fact that a state law claim may be preempted does not necessarily mandate that there be an ERISA remedy"); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir.), *cert. denied*, 506 U.S. 1033 (1992) ("the lack of an ERISA remedy does not affect a pre-emption analysis").

D. Petitioner Has Failed To Raise Any Valid Constitutional Impediment To Preemption Under ERISA.

Petitioner cites no valid authority to support his claim that he has some "fundamental" right to pursue a damages claim. The cases cited recognizing some constitutionally protected "fundamental" right deal with privacy rights of individuals to be free from state regulation in personal decisions involving such matters as marriage, procreation, abortion, refusal of life-saving techniques, and so forth. The only case which even mentions access to the courts, *Bounds v. Smith*, 430 U.S. 817 (1977), has nothing to do with this case. That case involved the right of prisoners to access the courts to litigate matters involving criminal law. As noted by the Tenth Circuit, the fundamental right petitioner seeks is much broader—petitioner asks this Court to ignore Congress' intent that ERISA provide the exclusive mechanism for remedying

improper processing of employee benefits and to restore his state law damages claims.

There is nothing "fundamental" about petitioner's damages claims. For example, petitioner characterizes his action as a claim for "wrongful death". (Petition, p. 1.) However, even under state law, a wrongful death claim does not arise under common law, but is purely statutory. *Abel v. Tisdale*, 619 P.2d 608, 609-10 (Okla. 1980) ("A wrongful death action is purely statutory . . . ."); *Roberts v. Merrill*, 386 P.2d 780, 782 (Okla. 1963) ("ever since statehood, the right of action to recover damages for wrongful death had its existence only by virtue of, and was solely governed by [state statute]"). Moreover, federal circuit courts have routinely and consistently held that state law wrongful death actions are preempted by ERISA where they arise out of the processing of a claim for employee benefits even when there is no substitute remedy under ERISA. *Tolton v. American Biodyne*, *supra* (state law wrongful death claim arising out of utilization review procedure is preempted by ERISA); *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1612, 128 L.Ed.2d 340 (1994) (state law wrongful death claim arising from allegations of delay in approval of ABMT is preempted by ERISA); *Kuhl v. Lincoln National Health Plan*, 999 F.2d 298 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 694 (1994) (state law claim that death of plan participant was result of defective claim processing of ERISA benefits is preempted by ERISA); *Corcoran v. United Healthcare, Inc.*, *supra* (state law wrongful death claim based on allegations of defective pre-certification of benefits is preempted); *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505 (10th Cir. 1991) (state law wrongful death claim based

on alleged improper processing of claim for benefits is preempted by ERISA).

There is also no due process barrier to preemption of state law claims in this case. ERISA was enacted pursuant to Congress' power under the Commerce Clause and the statute expressly covers employee benefit plans established under any "industry or activity affecting commerce". ERISA, §4(a) [29 U.S.C. §1003(a)]. This language was "intended to extend statutory coverage to the limit of congressional jurisdiction under the commerce clause". *Winterrowd v. David Freeman and Co., Inc.*, 724 F.2d 823, 825 (9th Cir. 1984). Congress' constitutional power to regulate interstate commerce includes the right to completely displace state regulation of private activities. *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 287-88 (1981) ("it is clear that the Commerce Clause empowers Congress to prohibit all—and not just inconsistent—state regulation of such activities").

Because ERISA was enacted pursuant to Congress' powers under the Commerce Clause and given the many competing interests addressed by the complex and detailed legislation, ERISA is clothed with a presumption of constitutionality. *Duke Power Co. v. Carolina Env. Study Group, Inc.*,438 U.S. 59, 83 (1978). If this Court were to grant certiorari, petitioner would be required to show that ERISA's preemption and civil enforcement provisions are "demonstrably arbitrary and irrational". *Id.* at 84. This burden would be impossible for petitioner to satisfy in this case. *First*, this Court has commented on several occasions that ERISA's civil enforcement scheme is "comprehensive", "detailed", "represents a careful balancing" of competing interests, and was drafted with

"deliberate care". *Peacock v. Thomas*, 516 U.S. ___, 116 S.Ct. ___, 133 L.Ed.2d 817 (1996); *Ingersoll-Rand v. McClendon, supra*; *Pilot Life, supra*; *Massachusetts Mutual v. Russell, supra*. This is directly contrary to any claim by petitioner that ERISA is "demonstrably arbitrary and irrational". *Second*, petitioner cannot establish any constitutionally protected property right. As this Court stated in *Duke*, "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy". *Id.* at 88. The Court then went on to state that the common law provided no property right to be protected by the Due Process Clause:

> Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law' . . . The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object' . . . despite the fact that 'otherwise settled expectations' may be upset thereby . . . Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Id. at 88 n. 32. Thus, the very foundation for petitioner's due process claim—that he has a constitutionally protected property interest in an action for damages—does not exist. Accordingly, petitioner has failed to raise any valid constitutional impediment to preemption under ERISA.

E. Plaintiff Has Failed To State A Claim For Breach Of Fiduciary Duties Under ERISA, §502(a)(3).

ERISA, §502(a)(3) permits a participant or beneficiary to bring a suit to enjoin any act or practice that violates

ERISA or the terms of an ERISA plan or to obtain "other appropriate *equitable* relief" to redress such violations or to enforce ERISA or the terms of a benefit plan. In *Varity Corporation v. Howe*, *supra*, this Court held that an action may be brought by a participant or beneficiary under §502(a)(3) to remedy a breach of fiduciary duties where a plan fiduciary intentionally and purposefully makes misrepresentations to participants about the financial status of a benefit plan for the purpose of inducing the participants into switching to a financially unstable benefit plan. Neither §502(a)(3) nor the holding in *Varity* provide petitioner with a claim for damages in this case.

Although petitioner alleges that respondents breached their fiduciary duties under ERISA, the sole basis for his claim is the processing of the claim for plan benefits. As the Tenth Circuit characterized it, petitioner's claim is "simply . . . a disagreement over the proper interpretation of the terms of the plan". (App. 17.) In *Varity*, this Court held that §502(a)(3) does *not* provide a remedy for such claims. Rather, the only remedial avenue for "breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims" is §502(a)(1)(B). 134 L.Ed.2d at 149. As discussed above, petitioner bypassed §502(a)(1)(B)'s injunctive remedy.[8]

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[8] The plaintiffs in *Varity* could not pursue an action for benefits under §502(a)(1)(B) because the actions of the fiduciaries in that case prevented the plaintiffs from being participants under the benefit plan. 134 L.Ed.2d at 151. In the present case, there is nothing about the alleged actions of respondents in processing the benefit claim that prevented petitioner or his decedent from pursuing an action for injunctive relief under §502(a)(1)(B). Rather, any decision by petitioner and/or his

(continued...)

Even if petitioner had stated a claim for relief under §502(a)(3), he cannot recover the relief he seeks. This Court has held that relief under §502(a)(3) is limited to "appropriate equitable relief". "Equitable relief" under this provision "refer[s] to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)". *Mertens v. Hewitt Associates*, 508 U.S. at 257 (emphasis in original). The relief petitioner requests is to prohibit the preemption of his state law claim for compensatory and punitive damages. Petitioner fails to address how this or any court can unilaterally alter the intent of Congress that state law claims be preempted by ERISA. Petitioner also has failed to explain why, although he purported to pursue a claim for equitable relief under §502(a)(3) in the district court and the circuit court, this is the first time he has suggested this particular remedy. Furthermore, although petitioner labels his claim as "equitable" relief, what he is really doing is disguising his claim for damages by dressing it in the word "equitable" so that it will pass muster under §502(a)(3). This is the same tactic attempted by the plaintiffs in *Mertens* and rejected by this Court:

> Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages*—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief.

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[8] (...continued)
decedent not to pursue an injunction or not to seek other sources of payment for the ABMT treatment and later seek benefits under §502(a)(1)(B) had nothing to do with respondents' review of the claim for benefits.

Id. at 169 (emphasis in original). Regardless of what he may attempt to call his claim, petitioner continues to seek damages which are not recoverable under §502(a)(3). As this Court held in *Varity*, in determining "appropriate equitable relief" under §502(a)(3), federal courts must "respect the 'policy choices reflected in the inclusion of certain remedies and the exclusion of others' ". 134 L.Ed.2d at 151.

CONCLUSION

For the foregoing reasons, petitioner has failed to satisfy any ground for a writ of certiorari and the petition should therefore be denied.

Respectfully submitted,

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APPENDIX

ERISA, § 514(a), 29 U.S.C. § 1144(a)

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.